

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

DANIEL W. BISHOP,

Plaintiff,

vs.

MICHAEL J. ASTRUE, Commission of
Social Security,

Defendant.

No. C08-2072

RULING ON JUDICIAL REVIEW

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I. INTRODUCTION

This matter comes before the Court on the Complaint (docket number 2) filed by Plaintiff Daniel W. Bishop on October 16, 2007, requesting judicial review of the Social Security Commissioner's decision to deny his application for Title II disability insurance benefits. Bishop asks the Court to reverse the decision of the Social Security Commissioner ("Commissioner") and order the Commissioner to provide him disability insurance benefits. In the alternative, Bishop requests the Court to remand this matter for further proceedings.

II. PRIOR PROCEEDINGS

Bishop applied for a period of disability and disability insurance benefits on March 22, 2004.¹ In his application, Bishop alleged an inability to work since March 5, 2003 due to degenerative changes in his right knee, degenerative changes in his lumbar spine, obesity, and sleep apnea. Bishop's application was denied on April 28, 2004. On July 28, 2004, his application for disability insurance benefits was denied on reconsideration. On September 10, 2004, Bishop requested an administrative hearing before an Administrative Law Judge ("ALJ"). On June 21, 2006, Bishop appeared with counsel, via video conference, before ALJ Andrew T. Palestini for an evidentiary hearing. Bishop and vocational expert Deborah Determan testified at the hearing. In a decision dated January 24, 2007, the ALJ denied Bishop's claim. The ALJ determined that Bishop was not disabled and was not entitled to disability insurance benefits because he was functionally capable of performing work that exists in significant numbers in the national economy. Bishop appealed the ALJ's decision. On August 30, 2007, the Appeals Council denied Bishop's request for review. Consequently, the ALJ's January 24, 2007 decision was adopted as the Commissioner's final decision.

¹ Bishop first applied for disability insurance benefits on June 18, 2003. The application was denied on September 5, 2003.

On October 16, 2007, Bishop filed this action for judicial review. The Commissioner filed an answer on December 19, 2007. On January 18, 2008, Bishop filed a brief arguing that there is not substantial evidence in the record to support the ALJ's finding that he is not disabled and that there is other work he can perform. On April 7, 2008, the Commissioner filed a responsive brief arguing that the ALJ's decision was correct and asking the Court to affirm the ALJ's decision. Bishop filed a reply brief on April 15, 2008. On November 14, 2007, both parties consented to proceed before the undersigned in this matter pursuant to the provisions set forth in 28 U.S.C. § 636(c).

III. PRINCIPLES OF REVIEW

Title 42, United States Code, Section 405(g) provides that the Commissioner's final determination following an administrative hearing not to award disability insurance benefits is subject to judicial review. 42 U.S.C. § 405(g). 42 U.S.C. § 405(g) provides the Court with the power to: "[E]nter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). "The findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive . . ." *Id.*

The Court must consider "whether the ALJ's decision is supported by substantial evidence on the record as a whole." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005) (citing *Harris v. Barnhart*, 356 F.3d 926, 928 (8th Cir. 2004)). Evidence is "substantial evidence" if a reasonable person would find it adequate to support the ALJ's determination. *Id.* (citing *Sultan v. Barnhart*, 368 F.3d 857, 862 (8th Cir. 2004)). Furthermore, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence.'" *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (quoting *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989), in turn quoting *Consolo v. Fed. Mar. Comm'n*, 282 U.S. 607, 620 (1966)).

In determining whether the ALJ's decision meets this standard, the Court considers "all of the evidence that was before the ALJ, but it [does] not re-weigh the evidence." *Vester*, 416 F.3d at 889 (citing *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005)). The Court not only considers the evidence which supports the ALJ's decision, but also the evidence that detracts from his or her decision. *Guilliams*, 393 F.3d at 801. "[E]ven if inconsistent conclusions may be drawn from the evidence, the agency's decision will be upheld if it is supported by substantial evidence on the record as a whole." *Id.* (citing *Chamberlain v. Shalala*, 47 F.3d 1489, 1493 (8th Cir. 1995)).

IV. FACTS

A. Bishop's Education and Employment Background

Bishop was born in 1957. He attended high school through the eleventh grade and obtained a GED in 1974. Bishop worked for the United States Army as a mechanic from 1974 to 1977 and from 1986 to 1989. In 1990, Bishop had various employers in the farming industry and earned about \$13,000 that year. Bishop then found steady employment with the United States Department of Agriculture from 1991 to 2001. His earnings rose regularly throughout his employment there, increasing from \$18,550 in 1991 to \$39,243 in 2001. In 2001 and 2002, Bishop briefly tried working as a postal worker but could not keep up with the expected pace. From 2002 until the time he stopped working in 2003, Bishop worked at Willowbrook Foods, Inc. as a quality control technician.

B. Administrative Hearing Testimony

1. Bishop's Testimony

At the June 21, 2006 administrative hearing, Bishop's attorney questioned Bishop about his past relevant work. Bishop's attorney asked him to describe his tasks at his previous positions and their difficulty level. Bishop testified that he had to bend, stoop, and crawl as part of his job repairing vehicles for the United States Army. Bishop also

testified that as a meat inspector for the United States Department of Agriculture, he frequently had to lift between fifty and seventy-five pounds.

Bishop testified that he goes to bed around 10:00 p.m. each night and wakes up around 6:00 a.m. According to Bishop, waking up takes him about half an hour because he has to wait for his joints to become mobile so that he can push himself up from the night stand. When his attorney asked Bishop about his daily activities, he replied:

A: I try to get outside and be moving around. I go out and we have a few animals outside, like three or four chickens. And I give them a little bit of feed out of a pail, and walk out looking at the cats and our dog, and try to get my movement in and hopefully lose a little bit of weight.

Q: Do you babysit?

A: I do watch my nephew. He's five years old. He's pretty independent, but the main thing I have to [do] for him is get him a glass of milk or turn on the VCR.

(Administrative Record at 556).

When his attorney asked him how far he could walk at one time, Bishop replied that he can walk about an eighth of a mile before becoming exhausted. He testified that he walks that distance four to five times a day in an attempt to lose weight. Bishop then testified that he spends a minimum of one to two hours lying down each day.

Bishop occasionally mows the lawn, but only when his teenage sons are unavailable to do so. He testified that he had an accident on August 15, 2005, while mowing the lawn; according to his testimony, Bishop rolled the lawn mower into a ditch and tore his left rotator cuff. However, he had surgery in January 2006 and made no assertions about a disability related to his left shoulder on the day of the hearing.

Bishop testified that he has added a ground floor bedroom, with an accessible bathroom, to his house because it is difficult for him to walk down stairs. He also said that he has trouble going down to the basement because of the stairs.

Bishop further testified that he occasionally goes deer hunting. He indicated that, while waiting for the deer, he can sit for twenty to thirty minutes in a chair, and then he has to stand up and stretch. He testified that he used to be the person in his group of hunter friends who would drag the deer out and eviscerate it, but he was unable to do that on his most recent hunting trip in December 2005.

Next, Bishop's attorney questioned Bishop regarding his medical history. Bishop testified that the major physical problem inhibiting his ability to work is the pain in his back, hips, and knee. Sitting for too long also causes him numbness and pain. Additionally, Bishop testified that he has trouble concentrating for long periods of time, and that the maximum amount of time he can concentrate is twenty-five minutes. Bishop testified briefly that he suffers from depression, but he takes an anti-depressant, which makes him "pretty easy going."² When asked if he has trouble sleeping, Bishop replied that he has sleep apnea. Bishop uses a CPAP machine to treat his sleep apnea. He testified that the CPAP machine fixes the problem and he "sleep[s] pretty well."³

Bishop also testified that he tried physical therapy to improve his back and joint problems, but the therapist suggested that he stop because he could see no significant improvement from the therapy. Other treatment options that Bishop tried include radiofrequency burns, fusion, injections, and medication.

When questioned about the radiofrequency burns, Bishop testified that "It helps, but the stiffness and -- the condition hasn't changed, but it's helped with some of the pain."⁴ His attorney also asked him how the injections were working, to which he replied that "it helps some of the pain. It doesn't eliminate all the problems I have with stiffness and

² See Administrative Record at 553.

³ *Id.* at 560.

⁴ See Administrative Record at 560.

soreness, but it -- I'm willing to try something different to help eliminate some of the pain and suffering I go through all the time.”⁵

Bishop's attorney next questioned him about his medication:

Q: Are you trying medication?

A: Yes, I do.

Q: And the -- I think there's -- the Judge has the most recent updated medication form. But there have been no changes since May in your medications?

A: No, there hasn't.

Q: Do you have any side effects from your medication?

A: At this time I don't physically feel any side effects.

Q: Do the medications eliminate all the pain?

A: No, they don't. They kind of dull the pain a little bit, but by the time the next dosage is coming up, the pain is starting to return; and I know it's about time for my medication.

(Administrative Record at 562).

The ALJ also questioned Bishop. He first asked Bishop about his prior activities as a board member at his church. Bishop indicated that he is no longer active on the board. The ALJ also questioned Bishop about his responsibilities watching his children:

Q: Prior to the time you started just watching your nephew, were you watching other children too?

A: I have two younger children, Your Honor, and they weren't in school at that time. But that was family. It wasn't anybody else.

Q: And did you stop watching them because they entered school?

A: That's correct, Your Honor. And they're very independent, and sometimes too independent.

(Administrative Record at 564).

⁵*Id.* at 561-62.

2. Vocational Expert's Testimony

At the hearing, the ALJ provided vocational expert Deborah Determan with a hypothetical for an individual with the following limitations:

[The individual's] ability [is] limited to lifting no more than 20 pounds occasionally and ten pounds frequently, and not above shoulder-level; could carry 20 pounds short distances. [The individual would] be able to sit for four to six hours a day with normal breaks, stand or move about for four to six hours total in a day with normal breaks, could walk as far as one-eighth of a mile at a time on even ground; could occasionally bend, squat, crawl, kneel, stoop or climb stairs, should never climb ladders. The work should not involve very fast physical moving about, should also not drive or operate moving machinery as a part of the job.

(Administrative Record at 566-67). The vocational expert testified that under such limitations, Bishop could not return to any of his past work. The vocational expert testified, however, that under such limitations, Bishop could perform sedentary work as a telephone quotation clerk (700 positions in Iowa and 3,600 positions in the nation), document preparer (350 positions in Iowa and 5,000 positions in the nation), or order clerk (250 positions in Iowa and 26,000 positions in the nation). The vocational expert also testified that, under such limitations, Bishop could perform light exertional work as a storage facility rental clerk (150 positions in Iowa and 18,000 in the nation) or information clerk (700 positions in Iowa and 76,000 in the nation). The ALJ provided the vocational expert with a second hypothetical which was identical to the first hypothetical except that the individual would not be able to sit for more than 30 minutes at a time without a brief period of standing. The vocational expert testified that all of the jobs she had listed for the first hypothetical would continue to be consistent with the second hypothetical.

Bishop's attorney also questioned the vocational expert. She provided the vocational expert with a hypothetical which was identical to the second hypothetical except that the individual could only concentrate on his work, even simple, routine work, for thirty minutes at a time, after which he would need a rest. The vocational expert testified

that, under such limitations, Bishop would generally be precluded from competitive employment.

C. Bishop's Medical History

On September 14, 2002, Bishop was evaluated by Dr. Charles Jacoby, M.D., for complaints of lower back pain. Bishop injured his back while working for the Army in 1988, and his chronic back pain started in February of 1989. On June 19, 1994, Bishop had lumbar fusion surgery on his L5 vertebrae to help alleviate the pain. Dr. Jacoby confirmed that Bishop's fusion surgery continued to be stable and that the remaining disk spaces were normal. On January 9, 2003, Bishop met with Donna Hackbart, LPN, at the Mason City Clinic, complaining of back and right knee pain. On February 11, 2003, Bishop had an appointment at the Mason City Clinic's pain management center. At that appointment, Bishop complained of chronic back discomfort that was worsening. On March 5, 2003, Sally Roper, ARNP, issued Bishop a prescription note stating that he should not return to work until he had a neurosurgical consult at the Iowa City Veterans Affairs Medical Center ("ICVA").

The neurosurgery department at ICVA noted on March 11, 2003, that it would need a myelogram done for Bishop before a neurosurgical consult. The myelogram, performed on May 13, 2003, produced multiple views of the L4-5 disc space on Bishop's back.⁶ On May 19, 2003, Bishop had a neurosurgical consult at the ICVA with Leanne Johnson-Meeter, a physician assistant, and with Dr. Kurt M. Eichholz. Bishop complained of pain in his back and in his legs. Dr. Eichholz told Bishop that his prior surgery continued to be stable and that there was no new surgical lesion. Dr. Eichholz also told Bishop that he could continue to manage his pain with medication and that he should consult with the pain management clinic in Des Moines ("pain management clinic"). Later that day, Bishop

⁶An MRI performed on February 19, 2003, failed to produce usable images of the neural foramina because the hardware from Bishop's fusion surgery obscured the images.

again met with Sally Roper, who gave him a provisional diagnosis of chronic lower back pain. On May 21, 2003, Roper noted that:

[Bishop] continues to take morphine SA 60 mg [bi-daily], reports his pain control is inadequate. He experiences pain several hours before his next pain pill is due. He recently went shopping at the Mall of America, reports walking around for hours pushing his child's stroller . . .

(Administrative Record at 207). Roper advised Bishop to continue taking morphine and to "limit [his] activity as tolerated."⁷ On May 27, 2003, Bishop was evaluated by Carol B. Hayne, a physician assistant, at the pain management clinic. Bishop told Hayne that his pain was in his lower back with some radiation into the left hip. Hayne made an assessment of mechanical back pain with right greater trochanteric bursitis related to degenerative joint disease. Bishop and Hayne discussed physical therapy options.⁸ Hayne then injected Bishop's right greater trochanteric bursa with Depo-Medrol and Bupivacaine, after which Bishop felt improvement in his pain.

On July 1, 2003, Bishop had a follow-up visit with the pain management clinic at which the clinical pharmacist, Sara Jean Doruska, noted that Bishop's pain was not optimally controlled. Doruska prescribed Gabapentin and further noted that Bishop had discussed tapering his morphine medication with Carol Hayne. Doruska also noted that surgery was not indicated based on the neurosurgical consult on May 19, 2003.

On August 28, 2003, Dr. John May, M.D., reviewed Bishop's medical records for Disability Determination Services ("DDS") and provided DDS with a residual functional capacity (RFC) assessment. Dr. May determined that Bishop could: (1) occasionally lift and/or carry twenty pounds, (2) frequently lift and/or carry ten pounds, (3) stand and/or

⁷ See Administrative Record at 208.

⁸ On June 2, 2003, Bishop met with physical therapist Craig G. Mennenga, who recommended trunk extension exercises and possibly a TENS unit to help Bishop with the pain.

walk with normal breaks for a total of at least two hours in an eight-hour workday, and (4) sit with normal breaks for a total of about six hours in an eight-hour workday. Dr. May also determined that Bishop could occasionally climb, balance, stoop, kneel, crouch, and crawl. Dr. May found no manipulative, visual, communicative, or environmental limitations. In his comments, Dr. May indicated that there were inconsistencies in Bishop's medical records which "at least partially erode the credibility of [Bishop's] allegations."⁹ Dr. May summarized the inconsistencies as follows:

Claimant states he has nearly constant low back and left hip pain made worse with activity. On 5/03 examination there were no complaints of left hip pain, however there was right hip pain noted at that examination There were complaints of left hip pain on 7/1/03 exam but no abnormality was noted . . . He states that he can stand ½ hour, walk ½ mile, however it is noted he was walking for hours pushing a baby stroller and sat comfortably during the examination in 7/03 without complaint of pain.

(Administrative Record at 227).

On November 14, 2003, Bishop returned to Doruska. Doruska's notes provide:

[Bishop] states that he ran out of morphine on Sunday evening and does not wish to restart an opiate. He feels that his pain is improving [with the increase in] the gabapentin dose.

(Administrative Record at 256). Doruska decided to increase Bishop's dose of Gabapentin and discontinue the morphine. On December 10, 2003, Bishop met with Roper, who noted that Bishop continued to have pain but had no new injuries. On December 30, 2003, Bishop went to the pain management clinic and filled out an extensive pain assessment form. Bishop indicated that his pain started in February of 1989. Bishop also reported that the furthest he could walk before stopping to rest was a half mile.

Roper filled out a physical limitations form for Bishop on January 20, 2004. After noting that Bishop had been advised to avoid driving and operating machinery while on his

⁹ See Administrative Record at 227.

current medications, Roper concluded that Bishop could lift up to 10 pounds for only fifteen minutes per half hour, stand for fifteen minutes per hour, and walk on a flat surface for a half hour per hour. Roper marked the following activities as fully restricted: lifting heavier weights, pulling, pushing, carrying, reaching above the shoulder, stooping, kneeling, and repeated bending.

On February 12, 2004, the Department of Veterans Affairs (“VA”) in Des Moines issued a Disability Rating Decision. VA found that Bishop’s lower back pain was 60% disabling and that degenerative changes in his right knee were 10% disabling. It based its decision on Bishop’s submitted statement, his medical records, and information from a former employer. VA concluded that Bishop was unable to secure a substantially gainful occupation and was therefore entitled to unemployability benefits effective March 5, 2003.

On March 24, 2004, Bishop had another follow-up visit with Roper. Roper noted that Bishop walked with a cane, had trouble getting up out of his chair, and had pain when sitting for more than fifteen minutes. Roper advised Bishop to continue going to the pain management clinic and to adhere to a low fat and low cholesterol diet with daily exercise.

On March 26, 2004, Dr. Melanie S. Woodward, M.D., reviewed Bishop’s medical records for DDS and provided DDS with an RFC assessment. Dr. Woodward determined that Bishop could: (1) occasionally lift and/or carry twenty pounds, (2) frequently lift and/or carry ten pounds, (3) stand and/or walk with normal breaks for a total of at least two hours in an eight-hour workday, and (4) sit with normal breaks for a total of about six hours in an eight-hour workday. Dr. Woodward concluded:

[D]espite being taken completely off narcotics, [Bishop] reports a 50% improvement in his back discomfort. At most recent follow-up [Bishop] declines the need for any changes in his current regimen and takes no medication to treat active pain. He indicates 3/30/04 that he is walking daily, fishing, and will continue to serve on the church board for another two years [T]he bulk of longitudinal medical and non-medical evidence supports that the claimant is capable of

sustaining work within the limitations outlined above and below.

(Administrative Record at 281). Dr. Woodward also determined that Bishop could occasionally climb, balance, stoop, kneel, crouch, and crawl. Dr. Woodward found no manipulative, visual, communicative, or environmental limitations.

On March 30, 2004, Bishop had another follow-up visit with Doruska. Doruska diagnosed Bishop with intervertebral disc disorders, hypertension, osteoarthritis of the back and right knee, adjustment disorder with depressed mood, and hyperlipidemia. She also gave Bishop a pain-related diagnosis of mechanical back pain with right greater trochanteric bursitis related to degenerative joint disease. Doruska noted that Bishop's depression was controlled at that time.

On June 6, 2004, Bishop underwent a sleep assessment. Bishop was put on a CPAP machine at this visit, and he felt that it made his sleep better and agreed to use it at home. On June 24, 2004, Bishop saw Doruska in the pain management clinic. Bishop reported having more breakthrough pain and weight gain since starting on the medication Amitriptyline, which he used to help him sleep. Doruska prescribed Hydrocodone for breakthrough pain and noted that a discontinuation of Amitriptyline should be considered at Bishop's next appointment because the CPAP may be sufficient to help Bishop sleep.

In a letter to DDS dated June 25, 2004, Dr. Kelly D. Ross, M.D., stated that Bishop is morbidly obese and cannot sit in one place for very long. She stated: "I suspect that you will have a difficult time getting him to work. As far as I know, he could handle some sedentary activities although it sounds like he can't sit in one place for a long period of time."¹⁰ On September 8, 2004, Roper provided Bishop's attorney with responses to questions Bishop's attorney had posed to her. In response to the question, "Is Mr. Bishop limited to sitting no more than 15 minutes during every 30 minute period?", Roper checked "No." In response to the question, "Is Mr. Bishop's attention concentration and

¹⁰ See Administrative Record at 275.

ability to sustain a normal pace impaired by his current medications?”, Roper checked “I disagree.” She noted that she did not know if Bishop’s medications were affecting him adversely.¹¹

On September 13, 2004, Roper noted that Bishop had gone to the Iowa State Fair with his family and experienced discomfort with all of the walking. Bishop also reported that he often needed to sit down on benches while shopping at Wal-Mart. Roper further noted that Bishop was wearing the CPAP machine at night, which helped him to sleep better. Roper recommended a low fat and low cholesterol diet with daily exercise.¹²

On November 2, 2004, Dr. Thomas Dean Hansen, M.D., examined Bishop. Dr. Hansen noted that Bishop had left-sided lower back pain and that the pain in Bishop’s leg was minimal. He also noted that Bishop appeared to be “in no apparent distress.”¹³ Dr. Hansen recommended some tests to assess whether radiofrequency nerve denervation would be a good option for Bishop.

On December 9, 2004, Bishop, complaining of hip pain, saw Hayne at the pain management clinic. Hayne injected Depo-Medrol into Bishop’s hip. On December 13, 2004, Bishop called the Mason City Clinic, complaining of both hip pain and knee pain. At his follow-up appointment on December 28, 2004, Bishop informed Hayne that the injection in his hip had only improved his pain for a few days. On the same day, Bishop saw Dr. Sonu Suri, M.D., who indicated that Bishop might have minimal early degenerative changes in the left hip joint, but his hip was otherwise unremarkable. Dr. Suri also examined Bishop’s knees and concluded that there was no abnormality in his knees.

¹¹ *Id.* at 286.

¹² Also on September 13, 2004, Bishop was evaluated by Donna M Hackbart, LPN, and screened positive for depression.

¹³ *See* Administrative Record at 320.

On January 28, 2005, Dr. Hansen performed a test block of the median branch nerves on the left side of the lumbar spine. Dr. Hansen noted that “[Bishop] tolerated the procedure without difficulty If he gets good relief with test blocks, we will proceed with left-sided lumbar [radiofrequency].”¹⁴ On January 31, 2005, the pain management clinic contacted Bishop for a post-operation follow-up phone call, and Bishop reported that the pain was being effectively controlled.

On February 3, 2005, Bishop met with Ronald K. Bunten, an orthopedist, about the pain in his knees. Bunten noted that Bishop used a knee brace with some benefit. He stated that Bishop was “quite obese but [was] able to transfer and walk independently,”¹⁵ though he was using a cane in his right hand. Bunten reviewed films of Bishop’s knees and found them unremarkable; he stated that he did not see any significant early degenerative change. He stated that Bishop’s hip and knee pain seemed to be referred from his back pain. Bunten indicated that surgery would probably not help and that Bishop would continue to be managed best in the pain management clinic with medication. Dr. Stephan Cooper, M.D., reviewed these findings and agreed. Also on February 3, 2005, Bishop returned to Doruska at the pain management clinic. Doruska made the following notations: “[Bishop is] making progress to lose weight. Still not able to walk without becoming easily tired.”¹⁶ Doruska also noted that Bishop had recently been ice fishing. Bishop described the pain in his knees as achy, with a shooting pain in his legs.

On April 22, 2005, Dr. Hansen gave Bishop another injection. Later that day, Bishop had a radiofrequency nerve denervation procedure. In the post-operation follow-up phone call, Bishop reported that the pain was being effectively controlled. On June 16, 2005, Dr. Stephan Cooper examined Bishop’s spine, and his impressions included mild

¹⁴*Id.* at 356.

¹⁵*See* Administrative Record at 399.

¹⁶*Id.* at 400.

spondylosis in the thoracic region with no acute abnormality, mild spondylosis in the cervical column with no acute abnormality, and muscle spasm. At an appointment at the pain management clinic on that same day, Bishop reported significant improvement in his back pain after the radiofrequency procedure, but he complained that his shoulders had since become painful. On August 9, 2005, Dr. Hansen indicated that Bishop did well with the radiofrequency procedure on his left side and that a radiofrequency procedure was scheduled for the right side. He assessed Bishop with lumbar degenerative disc, facet arthritis, and secondary muscle pain. Dr. Hansen also prescribed Methadone for Bishop.

During Bishop's many visits to the pain management clinic, Bishop ranked his pain levels on a scale of one to ten, one being none at all and ten being the worst possible. Bishop had to rank his current pain, his usual or average pain, his pain at its worst, and his pain at its least. His pain levels at the time of his visits ranged from five to nine. On May 27, 2003, Bishop reported that his usual pain was a seven, his pain at its worst was a nine, and his pain at its least was a six. On that date, he stated that he would find a pain level of three to four acceptable. On July 1, 2003, Bishop reported that his usual pain was a six to seven, but his pain at its worst was a ten; he also stated that he would find a pain level of five acceptable. On October 14, 2003, Bishop reported that his current pain was a seven, his usual pain was a four and a half to five, and his pain at its worst was a nine. On March 30, 2004, Bishop reported that his pain at its worst was a seven, his pain at its least was a six, and his current pain and usual pain were a five. On November 2, 2004, Bishop reported that his current pain was an eight, and his pain at its worst during the last twenty-four hours was a seven. Despite this report, Dr. Hansen had noted on that date that Bishop appeared to be "in no apparent distress."¹⁷

The Court notes that pages 443 through 542 of the Administrative Record contain documentation of Bishop's left rotator cuff tear and resulting surgery, which are not

¹⁷ See Administrative Record at 320.

material to this case. Bishop has made no assertions about a disability relating to his left rotator cuff.

V. CONCLUSIONS OF LAW

A. ALJ's Disability Determination

The ALJ determined that Bishop is not disabled. In making this determination, the ALJ was required to complete the five-step sequential test provided in the social security regulations. *See* 20 C.F.R. § 404.1520(a)-(f); *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987); *Page v. Astrue*, 484 F.3d 1040, 1042 (8th Cir. 2007); *Anderson v. Barnhart*, 344 F.3d 809, 812 (8th Cir. 2003). The five steps an ALJ must consider are:

(1) whether the claimant is gainfully employed, (2) whether the claimant has a severe impairment, (3) whether the impairment meets the criteria of any Social Security Income listings, (4) whether the impairment prevents the claimant from performing past relevant work, and (5) whether the impairment necessarily prevents the claimant from doing any other work.

Goff v. Barnhart, 421 F.3d 785, 790 (8th Cir. 2005) (citing *Eichelberger v. Barnhart*, 390 F.3d 584, 590 (8th Cir. 2004); *see also* 20 C.F.R. § 404.1520(a)-(f). “If a claimant fails to meet the criteria at any step in the evaluation of disability, the process ends and the claimant is determined to be not disabled.” *Eichelberger*, 390 F.3d at 590-91 (citing *Ramirez v. Barnhart*, 292 F.3d 576, 580 (8th Cir. 2002)).

“To establish a disability claim, the claimant bears the initial burden of proof to show that he [or she] is unable to perform his [or her] past relevant work.” *Frankl v. Shalala*, 47 F.3d 935, 937 (8th Cir. 1995) (citing *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the residual functional capacity to perform a significant number of other jobs in the national economy that are consistent with claimant’s impairments and vocational factors such as age, education, and work experience. *Id.* The RFC is the most an individual can do despite the combined effect of all of his or her credible limitations. 20 C.F.R. § 416.945. “‘It is the ALJ’s responsibility

to determine a claimant's RFC based on all relevant evidence, including medical records, observations of treating physicians and others, and claimant's own descriptions of his [or her] limitations.'” *Tellez v. Barnhart*, 403 F.3d 953, 957 (8th Cir. 2005) (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001)).

The ALJ applied the first step of the analysis and determined that Bishop had not engaged in substantial gainful activity since his alleged disability onset date, March 5, 2003. At the second step, the ALJ concluded, from the medical evidence, that Bishop had the following impairments: left hip and right knee degenerative changes, obesity, sleep apnea, degenerative changes of the lumbar spine, spondylosis of the thoracic region, and left shoulder status post arthroscopy with rotator cuff repair for a complete tear with tendon retraction.¹⁸ At the third step, the ALJ found that Bishop did not have “an impairment or combination of impairments listed in, or medically equal to one listed in [20 C.F.R. § 404,] Appendix 1, Subpart P, Regulations No. 4 [(the Listing of Impairments)].” At the fourth step, the ALJ determined Bishop's RFC as follows:

[Bishop] has the maximum functional capacity to lift 20 pounds occasionally and 10 pounds frequently but not above shoulder level. He can carry 20 pounds short distances. [Bishop] can sit for four to six hours in a day with normal breaks. He can stand and move about for four to six hours total in a day with normal breaks. He can walk as far as an eighth of a mile at one time on even ground. He can no more than occasionally bend, squat, crawl, kneel, stoop, and climb stairs. He can never climb ladders. His work should not involve very fast physical moving about. He cannot drive or operate moving machinery as part of his job.

(Administrative Record at 21). Using this RFC, the ALJ determined that Bishop met his burden of proof at the fourth step, because he was unable to perform his past relevant work. However, at the fifth step, the ALJ determined that Bishop, based on his age,

¹⁸The ALJ found that Bishop did not have a severe mental impairment. *See* Administrative Record at 18.

education, previous work experience, and RFC, could work at jobs that exist in significant numbers in the national economy. Therefore, the ALJ concluded Bishop was “not disabled.”

B. Whether the ALJ Fully and Fairly Developed the Record

Bishop contends that the ALJ erred in four respects.¹⁹ First, Bishop argues that the ALJ erred by failing to fully consider Bishop’s obesity. Second, Bishop argues that the ALJ failed to fully consider all of the limitations contained in the record when assessing his RFC. Third, Bishop argues that the ALJ abused his discretion when he found Bishop not credible. Lastly, Bishop argues that the ALJ erred by failing to consider the VA Disability Rating Decision. Bishop requests that the Court reverse the Commissioner’s decision and remand it with directions to award benefits. Alternatively, Bishop requests this matter be remanded for further proceedings. The Commissioner argues that there is substantial evidence in the record as a whole which supports the ALJ’s decision; and therefore, the decision should be affirmed.

1. Consideration of Obesity

Bishop argues that the ALJ failed to properly consider his obesity. Specifically, Bishop argues that “[a]lthough the ALJ found that Bishop’s obesity was a ‘severe impairment’ he failed to properly consider the functional limitations of Bishop’s obesity in combination with his other impairments.”²⁰ The Commissioner argues that the ALJ properly considered Bishop’s obesity.

Social Security Ruling (“SSR”) 02-1p provides that the Social Security Administration considers “obesity to be a medically determinable impairment and reminds adjudicators to consider the effects when evaluating disability. The provisions also remind

¹⁹ Although Bishop’s brief contains only three subsections within the argument section, Bishop’s first subsection can be broken down into two separate issues, creating four total issues.

²⁰ See Bishop’s Brief at 8.

adjudicators that the combined effects of obesity with other impairments can be greater than the effects of each of the impairments considered separately.” SSR 02-1p also instructs “adjudicators to consider the effects of obesity not only under the listings but also when assessing a claim at other steps of the sequential evaluation process, including when assessing an individual’s residual functional capacity.”

At the time of the hearing, Bishop weighed 330 pounds. (Administrative Record at 559). In his decision, the ALJ determined that Bishop’s obesity was a severe impairment. In addition, when assessing Bishop’s RFC, the ALJ found that Bishop has “postural limitations because [of] his obesity . . . [which] could be expected to limit his ability to lift and carry and perform certain postural activities . . .”²¹ Having reviewed the entire record, the Court finds that the ALJ sufficiently considered Bishop’s obesity when making his decision that Bishop is not disabled because he “consider[ed] the effects of obesity . . . when assessing [Bishop’s] claim at other steps of the sequential evaluation process, including when assessing [his] residual functional capacity.” SSR 02-1p.

2. Bishop’s Residual Functional Capacity

Bishop also argues that the ALJ failed to fully consider the record when assessing Bishop’s RFC. Specifically, Bishop argues that the ALJ erred when he found that Sally Roper’s opinion should not receive controlling weight, since her opinion is consistent with Bishop’s medical history and subjective complaints. The Commissioner argues that the ALJ properly assessed Bishop’s RFC.

At step four of the five-step sequential test, “[b]efore determining whether [Bishop] was able to return to [his] past work, the ALJ was required to determine [his] RFC.” *Roberson v. Astrue*, 481 F.3d 1020, 1023 (8th Cir. 2007) (citing 20 C.F.R. § 404.1520(e)). A claimant’s RFC is the most he or she can do despite his or her physical and mental limitations. *Depover v. Barnhart*, 349 F.3d 563, 565 (8th Cir. 2003); *see also* 20 C.F.R. § 404.1545(a) (the RFC is “the most [a claimant] can still do despite [his or

²¹ See Administrative Record at 19.

her] limitations.”). More specifically, the RFC “‘is a function-by-function assessment based upon all the relevant evidence of an individual’s ability to do work-related activities,’ despite his or her physical or mental limitations.” *Roberson*, 481 F.3d at 1023 (quoting S.S.R. 96-8p, 1996 WL 374184 at *3 (Social Security Administration July 2, 1996)). The RFC must be supported by some medical evidence, but the ALJ is not limited to considering only the medical evidence. *Miles v. Barnhart*, 374 F.3d 694, 700 (8th Cir. 2004). “Rather, in assessing [an] RFC, an ALJ must consider all the record evidence.” *Id.* Relevant evidence for determining a claimant’s RFC includes “‘medical records, observations of treating physicians and others, and an individual’s own description of his [or her] limitations.’” *Lacroix v. Barnhart*, 465 F.3d 881, 887 (8th Cir. 2006) (quoting *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004)). A treating physician’s opinion is only given controlling weight if it “‘is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence.’” *Dolph v. Barnhart*, 308 F.3d 876, 878 (8th Cir. 2002) (quoting 20 C.F.R. § 404.1527(d)(2)).

The ALJ found that Roper’s opinion should not be given controlling weight because it was “not well-supported by medically acceptable clinical and laboratory diagnostic techniques and [was] inconsistent with other substantial medical evidence in the case record.”²² Bishop argues that Roper’s opinion should be given weight because it is consistent with Bishop’s own subjective complaints about his pain and his restrictions. However, Roper’s opinion about Bishop’s restrictions is not consistent with Bishop’s own descriptions of his limitations. While Roper opined that Bishop could only occasionally lift zero to ten pounds,²³ Bishop testified at the hearing that he could lift twenty to twenty-

²² See Administrative Record at 19.

²³ *Id.* at 270.

five pounds without much problem.²⁴ Additionally, Roper’s opinion is inconsistent with the RFCs of both Dr. May and Dr. Woodard. An ALJ does not need to give controlling weight to a physician’s RFC assessment if it is inconsistent with other substantial evidence in the record. *Strongson v. Barnhart*, 361 F.3d 1066, 1070 (8th Cir. 2004). After reviewing the record as a whole, the Court finds that the ALJ did not err in assessing Bishop’s RFC without giving the opinion of Roper controlling weight.

3. Credibility Determination

Next, Bishop argues that the ALJ abused his discretion when he found Bishop not credible based on his conclusion that Bishop’s complaints about his pain were inconsistent with his reported daily activities. Specifically, Bishop argues that the ALJ made unsupported assumptions about the frequency, duration, and intensity of Bishop’s daily activities. The Commissioner argues that the ALJ properly considered Bishop’s subjective complaints.

When evaluating the credibility of a claimant’s subjective complaints, “[t]he [ALJ] must give full consideration to all the evidence presented relating to subjective complaints, including the claimant’s prior work record, and observations by third parties and treating and examining physicians relating to such matters as: (1) the claimant’s daily activities; (2) the duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medication; [and] (5) functional restrictions.” *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984). Subjective complaints may be discounted if inconsistencies exist in the evidence as a whole. *Pelkey v. Barnhart*, 433 F.3d 575, 578 (8th Cir. 2006). However, “[w]hen rejecting a claimant’s complaints of pain, the ALJ must make an express credibility determination, must detail reasons for discrediting the testimony, must set forth the inconsistencies, and must discuss the *Polaski* factors.” *Baker v. Apfel*, 159 F.3d 1140, 1144 (8th Cir. 1998) (citation omitted). “However, the ALJ need not explicitly discuss each *Polaski* factor. The ALJ

²⁴ See Administrative Record at 551.

only need acknowledge and consider those factors before discounting a claimant's subjective complaints." *Eichelberger v. Barnhart*, 390 F.3d 584, 590 (8th Cir. 2004) (citations omitted). Where an ALJ seriously considers, but for good reason explicitly discredits a claimant's subjective complaints, the Court will not disturb the ALJ's credibility determination. *Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001) (citing *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir. 1996)).

In determining that Bishop's subjective allegations about the severity of his symptoms and limitations were not credible, the ALJ found:

The claimant described having some limitations in his activities of daily living. However, the undersigned notes that the claimant baby sat, gardened, hunted, and fished, was extremely involved as a member of his church board, took his children fishing, and mowed.

(Administrative Record at 17). Bishop claims that since his daily activities are "inherently adaptable to a slow pace, short duration and infrequent schedule," the ALJ abused his discretion by assuming that Bishop engaged in these activities frequently and for long periods of time.²⁵ However, the claimant's daily activities are not the only factor the ALJ considered.

In addition to considering Bishop's and third parties' accounts of Bishop's daily activities, the ALJ considered Bishop's work history,²⁶ medications,²⁷ and the objective medical evidence.²⁸ "The ALJ need only acknowledge and consider the [*Polaski*] factors, not explicitly discuss each one." *Travis v. Astrue*, 477 F.3d 1037, 1042 (8th Cir. 2007). *See also Brown v. Chater*, 87 F.3d 963, 966 (8th Cir. 1996) (Even if the ALJ focused on

²⁵ See Bishop's Brief at 12.

²⁶ See Administrative Record at 16.

²⁷ *Id.*

²⁸ See Administrative Record at 16, 17.

the factors that supported his findings, it is sufficient that he acknowledge and consider the *Polaski* factors).

There is sufficient evidence in the record to support the ALJ's conclusion that Bishop's activities are not consistent with his allegations about his pain and limitations. Bishop testified that he walks an eighth of a mile up to five times a day.²⁹ He also babysits his nephew.³⁰ In addition, Bishop mows the lawn when his sons are unavailable, which is presumably often because his sons are involved with sports.³¹ Bishop's reported hobbies on December 27, 2005, were hunting, fishing, reading, and adding an addition to his home.³² Bishop also attended church twice a week as of July 2003,³³ and he was "extremely involved" with his church until shortly before the administrative hearing.³⁴ Since the evidence as a whole supports the conclusion that Bishop's activities were frequent, the ALJ properly found that there were inconsistencies between Bishop's daily activities and his subjective complaints. *See Pelkey*, 433 F.3d at 578 (an ALJ may discount subjective complaints if there are inconsistencies in the evidence as a whole). Even if inconsistent conclusions could be drawn on this issue, the Court upholds the conclusions of the ALJ because they are supported by substantial evidence on the record as a whole. *Guilliams*, 393 F.3d at 801.

²⁹*Id.* at 555.

³⁰*Id.* at 556.

³¹*Id.*

³²*Id.* at 460.

³³*Id.* at 265.

³⁴*Id.* at 325.

Bishop further argues that “there is no logical explanation for a man to undergo the invasive procedures endured by Bishop unless he suffered severe physical pain.”³⁵ In other words, Bishop argues that the objective medical evidence of the procedures he has endured bolsters his credibility. However, the ALJ considered Bishop’s invasive medical procedures when evaluating Bishop’s credibility, saying, “[t]he undersigned also notes that the claimant . . . underwent treatment that included lumbar facet blocks and radiofrequency nerve denervation.”³⁶ The ALJ still found Bishop not credible based on his consideration of all of the *Polaski* factors.

Additionally, Bishop argues that the ALJ erred by failing to consider the effects of the medication Methadone. Specifically, Bishop cites *Krowiorz v. Barnhart*, in which the claimant experienced significant side effects from the drug Methadone. *Krowiorz v. Barnhart*, 2005 WL 715930, *24 (N.D. Iowa, March 30, 2005). In *Krowiorz*, the claimant had abused prescription drugs in the past and had developed a dependence on Methadone. *Id.* The Court found that “the addictive quality of Methadone [and other similar drugs] represents a significant potential side effect from those medications that should be considered in connection with a full *Polaski* analysis.” *Id.* However, *Krowiorz* is irrelevant to the instant case because Bishop has failed to establish that he has experienced any addiction, let alone other side effects, from Methadone.³⁷ *See Depover v. Barnhart*, 349 F.3d 563, 566 (8th Cir. 2003) (“[I]t was reasonable for the ALJ to consider the fact that no medical records during this time period mention [the claimant] having side effects from any medication.”) Therefore, the Court finds that Bishop’s argument about Methadone is without merit.

³⁵ See Bishop’s Reply Brief at 4.

³⁶ See Administrative Record at 16.

³⁷ Bishop did report a side effect of sexual dysfunction which was resolved when the dosage was reduced. See Administrative Record at 479, 488.

The ALJ properly discounted Bishop's subjective complaints about his pain and limitations because these complaints were inconsistent with the daily activities reflected in the evidence as a whole. Additionally, the ALJ properly acknowledged and considered all of the *Polaski* factors. The ALJ also properly considered Bishop's medical history, including the invasive medical procedures. Finally, the ALJ properly discounted the newly alleged side effects of Methadone on Bishop's credibility. Having reviewed the record, the Court finds that the ALJ properly considered Bishop's credibility.

4. Bishop's VA Disability Rating Decision

Finally, Bishop argues that the ALJ did not provide an evaluation of the VA Disability Rating Decision according to the standards set out in *Morrison v. Apfel*, 146 F.3d 625, 628 (8th Cir. 1998). The Commissioner argues that the ALJ properly considered the VA Disability Rating Decision.

Morrison requires an ALJ to give some weight to the VA's findings and to give reasons that "enable a reasoned review by the courts" if he or she rejects the VA's findings. *Id.* However, the ALJ is not bound by the VA's decision. *Fisher v. Shalala*, 41 F.3d 1261, 1262 (8th Cir. 1994).

In his decision, the ALJ stated:

The undersigned gives this [VA] rating some weight, but the Veteran's Administration rating was based on its rules and not on those of the Social Security Administration. Therefore, the Veteran's Administration rating is not binding in this decision.

(Administrative Record at 15). Bishop argues that this explanation is insufficient given the standard set forth in *Pelkey v. Barnhart*, 433 F.3d 575, 579-580 (8th Cir. 2006). In *Pelkey*, the claimant submitted a VA Disability Rating Decision in support of his disability claim. *Id.* at 579. The Disability Rating Decision was accompanied by the medical evidence that supported the decision. *Id.* The Court found that the ALJ had properly considered the VA Disability Rating Decision because he had "fully considered the evidence underlying the VA's final conclusion." *Id.*

In the instant case, the VA Disability Rating Decision was based on medical evidence which was in the record and which the ALJ reviewed and considered thoroughly. Since the ALJ “fully considered the evidence underlying the VA’s final conclusion,” this meets the standard set out in *Pelkey*. *Pelkey*, 433 F.3d at 579. The ALJ gave some weight to the VA’s findings, and he discussed the underlying medical records at some length, providing the courts with the means to conduct a reasoned review of the decision. *See Fisher v. Shalala*, 41 F.3d at 1262. The Court finds that the ALJ properly considered the VA’s Disability Rating Decision according to the standards set out in *Pelkey* and *Morrison*.

VI. CONCLUSION

The Court finds that the ALJ properly considered Bishop’s obesity, assessed Bishop’s RFC, determined Bishop’s credibility, and considered the VA Disability Rating Decision. Accordingly, the Court determines that the ALJ’s decision is supported by substantial evidence and shall be affirmed.

VII. ORDER

For the foregoing reasons, it is hereby **ORDERED**:

1. The final decision of the Commissioner of Social Security is **AFFIRMED**;
2. Plaintiff’s Complaint (docket number 2) is **DISMISSED** with prejudice; and
3. The Clerk of Court is directed to enter judgment accordingly.

DATED this _____ day of July, 2008.

JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA